FEB 23 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 614

STATE OF WISCONSIN, ex rel
WISCONSIN LUTHERAN HIGH
SCHOOL CONFERENCE,

Appellant,

vs.

SID H. SINAR, Inspector of Buildings
of the City of Wauwatosa, Wisconsin,
E. L. VANDERJAGT,

Appellees.

STATEMENT AS TO JURISDICTION

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

ERNST J. VON BRIESEN,
135 West Wells Street,
Milwaukee 3, Wisconsin,

RALPH M. HOYT,
735 North Water Street,
Milwaukee 2, Wisconsin,

Attorneys of Record
for Appellant.

VON BRIESEN & REDMOND,
C. R. DINEEN,
Milwaukee, Wisconsin,
Of Counsel.

SUBJECT INDEX

	Page
(a) Reported Opinion in Court Below	1
(b) Grounds of Jurisdiction	1
(i) Nature of the Proceeding	2
(ii) Pertinent Dates	2
(iii) Statutory Provisions Relied Upon for Jurisdiction	2
(iv) Cases Supporting Jurisdiction	3
(v) Text of the City Ordinance Involved	3-4
(c) Question Presented by the Appeal	4-5
(d) Statement of the Case	5-9
(e) Substantial Character of the Federal Questions	9-17
(h) Appendix "A"	18
Majority Opinion of the Supreme Court of the State of Wisconsin	19-29
Dissenting Opinion of Justice Steinle	30-34
Opinion and Decision of Circuit Judge Breidenbach Denying Motion to Quash Alternative Writ	35-40
Opinion and Decision of Circuit Judge O'Connell Sustaining Demurrers to Return and Answer	41-56
(i) Appendix "B"	57
Order and Judgment of the Supreme Court of Wisconsin Reversing the Orders and Judgment of the Circuit Court of Milwaukee County	58-59

Page

Order of the Supreme Court of Wisconsin Denying Appellant's Motion for Rehearing.....60-61

Cases Cited

American University v. Prentiss (1953), 113 Fed. Supp. 389 16

Catholic Bishop of Chicago v. Kingery (1939), 371 Ill. 257, 20 N.E. (2d) 583 .....12, 24, 32

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 66 L. ed. 239, 42 Sup. Ct. 106..... 3

Euclid v. Amber Realty Co., 272 U.S. 365, 387, 395, 71 L. ed. 303, 310, 314, 47 Sup. Ct. 114, 118, 121 11

Fiske v. Kansas, 274 U.S. 380, 385, 71 L. ed. 1108, 47 Sup. Ct. 655 3

Jamison v. Texas, 318 U.S. 413, 87 L. ed. 869, 63 Sup. Ct. 669 3

King Manufacturing Co. v. Augusta, 277 U.S. 100, 72 L. ed. 801, 48 Sup. Ct. 489 3

Miami Beach v. State ex rel Lear (1937), 128 Fla. 750, 175 So. 537 .....12, 13, 24, 32

Mooney v. Orchard Lake (1952), 333 Mich. 389, 52 N.W. 2d 308 16

Phillips v. Homewood (1951), 255 Ala. 180, 50 So. 2d 267 .....13, 32

Prentiss v. American University (1954), 214 Fed. 2d 282 16

Page

Roman Catholic Archbishop v. Baker (1932), 140 Ore. 600, 15 Pac. 2d 391 ..... 15, 32

Roman Catholic Welfare Corp. of San Francisco v. Piedmont (1955), 273 Pac. 2d 943 14

State v. Northwestern Preparatory School (1949), 228 Minn. 363, 37 N.W. 2d 370 ..... 13-14, 32

State ex rel. Roman Catholic Bishop of Reno v. Hill (1939), 59 Nev. 231, 90 Pac. 2d 217 16

State ex rel. Snyod of Ohio v. Joseph (1942), 139 Ohio St. 229, 39 N.E. 2d 515 ..... 16, 32

State ex rel Wisconsin Lutheran High School Conference v. Sinar (instant case under appeal here). (1954), 267 Wis. 91, 65 N.W. 2d 43 ..... 8, 9, 10-11, 12

Wrather v. American University 75 Sup. Ct. 217..... 16

Statutes Cited

Sec. 1257(2) of Title 28, U.S.C.A. 2

Sec. 14.03(1) of Zoning Ordinance of City of Wauwatosa, Wisconsin 3-4, 5, 6, 7, 21-22

Constitution of the United States, Fourteenth Amendment

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No.

STATE OF WISCONSIN, ex rel
WISCONSIN LUTHERAN HIGH
SCHOOL CONFERENCE,

Appellant,

vs.

SID H. SINAR, Inspector of Buildings
of the City of Wauwatosa, Wisconsin,
E. L. VANDERJAGT,

Appellees.

STATEMENT AS TO JURISDICTION

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

(a) Reported Opinion in Court Below

The opinion of the court below, the Supreme Court of the State of Wisconsin, is reported in Volume 267 of the Wisconsin Reports, page 91, and in Volume 65 of the Northwestern Reporter, 2d, page 43.

(b) Grounds of Jurisdiction

The grounds on which the jurisdiction of this court is invoked are the following:

(i) Nature of the Proceeding

The nature of the proceeding is an appeal by the State of Wisconsin, ex rel Wisconsin Lutheran High School Conference, from the final judgment of the Supreme Court of the State of Wisconsin denying a motion of the Appellant for rehearing of an order and judgment previously entered by the Supreme Court of Wisconsin, wherein it reversed a judgment entered in the Circuit Court of Milwaukee County, Wisconsin, and directed that a peremptory writ of mandamus issued by said Circuit Court, pursuant to its judgment, be quashed.

The statute pursuant to which the appeal is brought is 28 U.S.C. Sec. 1257(2).

(ii) Pertinent Dates

The judgment or decree of the Supreme Court of Wisconsin sought to be reviewed was dated and entered on June 8, 1954. The order denying Appellant's motion for a rehearing was dated and entered on October 5, 1954. The notice of appeal was filed on December 28, 1954, in the Circuit Court of Milwaukee County, Wisconsin, which is the court which was then possessed of the record.

(iii) Statutory Provision Relied Upon for Jurisdiction

The statutory provision believed to confer upon the Supreme Court of the United States jurisdiction of the appeal is Sec. 1257(2) of Title 28 of the United States Code, in that there is drawn in question the validity of a statute of the State of Wisconsin (specifically, an ordinance of the City of Wauwatosa, Wisconsin) on the

ground of its being repugnant to the Constitution of the United States; the decision and judgment of the highest court of the State of Wisconsin having been in favor of its validity.

(iv) Cases Supporting Jurisdiction

The following cases are believed to sustain the jurisdiction:

To the point that a city ordinance is a "statute of the state" within the meaning of Sec. 1257(2) of Title 28:

Jamison v. Texas
318 U.S. 413, 87 L.ed. 869, 63 Sup. Ct. 669

King Manufacturing Co. v. Augusta
277 U.S. 100, 72 L.ed. 801, 48 Sup. Ct. 489.

To the point that the Supreme Court of the United States has jurisdiction to review, upon appeal, a determination of the highest court of a state in favor of a state statute which is claimed to be in conflict with the Constitution of the United States as applied to a particular factual situation:

Dahnke-Walker Milling Co. v. Bondurant
257 U.S. 282, 66 L.ed. 239, 42 Sup. Ct. 106

Fiske v. Kansas
274 U.S. 380, 385, 71 L.ed. 1108, 47 Sup. Ct. 655.

(v) Text of the City Ordinance

The city ordinance whose validity is involved in the case is Sec. 14.03(1) of the Zoning Ordinance of the City of Wauwatosa, Wisconsin, which reads as follows:

"Section 14.03. 'A' RESIDENCE DISTRICT REGULATIONS.

(1) Use: No building or premises shall be used and no building shall be hereafter erected or altered within any 'A' Residence District, unless otherwise provided in this Ordinance, except for the following uses:

(a) Single Family Dwellings.

(b) Municipal Utilities and Buildings.

(c) Community Center Buildings.

(d) Churches and Temples of Worship.

(e) Public Schools and Private Elementary Schools.

(f) Public Libraries and Museums.

(g) Telephone Exchanges.

(h) Parks, Recreation Buildings and Country Clubs not conducted as a business or for profit.

(i) Railroad or Electric Right-of-Way utilized for any purpose essential to the operation of the railroad or utility, but not including any privately operated business or industry.

(j) Temporary Buildings and uses for construction purposes for a period not to exceed 1 year.

(k) Accessory uses incident to the above uses, including private garages, professional offices, home occupations, and signs not more than 12 square feet in area advertising premises for sale or rent, but not including the conduct of any retail or wholesale business or manufacture."

(c) Question Presented by the Appeal

The question presented by the appeal is whether Sec. 14.03(1) of the Zoning Ordinance of the City of Wau-

watosa violates Sec. 1 of the 14th Amendment to the Constitution of the United States (1) by denying to the relator the equal protection of the laws, in that said section of the ordinance permits the use and erection of a public high school in an "A" residence district but prohibits the use and erection of a private high school on the relator's land in such district; and (2) by depriving the relator of property without due process of law, in that said section of the ordinance prohibits the construction, maintenance and operation of a private high school on the relator's land located in an "A" residence district of the City of Wauwatosa.

(d) Statement of the Case

The Supreme Court of Wisconsin on June 8, 1954 reversed a judgment of the Circuit Court of Milwaukee County which had directed the issuance of a writ of mandamus compelling the defendant building inspector of the City of Wauwatosa to issue a building permit for the erection of a high school building on land in which the relator had an interest, in the City of Wauwatosa. A motion by the plaintiff for rehearing was denied by the Supreme Court of Wisconsin on October 5, 1954. Thereupon the record in the action was remanded to the Circuit Court of Milwaukee County; and the plaintiff has filed in that court its notice of appeal to the Supreme Court of the United States.

The action of mandamus was commenced in the Circuit Court of Milwaukee County because the building inspector had refused a building permit for the relator's proposed high school building on the ground that the erection and operation of such a high school would violate Sec. 14.03(1) of the Zoning Ordinance of the City

of Wauwatosa. The land in which the relator had an interest, and on which it planned to erect its high school, is located in an "A" residence district as defined in the zoning ordinance. Sec. 14.03(1) of the ordinance permits public high schools but not private high schools in an "A" residence district.

An alternative writ of mandamus was issued pursuant to the petition. The defendant building inspector moved to quash the alternative writ, but the motion was denied by the Circuit Court. He then filed a return to the writ setting up the ordinance as justification for his denial of the building permit. Meanwhile an owner of residential property in the vicinity of the proposed high school had been permitted by the court to intervene as a defendant, and he filed an answer to the petition for the alternative writ, in which he likewise set up the ordinance as a defense to the mandamus action. The plaintiff demurred to both the building inspector's return and the interpleaded defendant's answer. Both demurrers were sustained by the Circuit Court, which thereupon entered judgment directing the issuance of a peremptory writ of mandamus. From that judgment the defendant building inspector and the interpleaded defendant appealed to the Supreme Court of Wisconsin, and that court reversed the judgment and directed that the writ of mandamus be quashed.

The petition for the writ of mandamus alleged that Sec. 14.03(1) of the Wauwatosa zoning ordinance was "unconstitutional and void in that it is arbitrary, discriminatory, unfair, unreasonable and does not promote the health, safety, morals or general welfare of the community"; and further alleged that "the erection of a high school by the petitioner will not in any way detrimentally affect either the public health, safety, morals or general

welfare of the community." The answer of the interpleaded defendant specifically denied these allegations. The return of the defendant building inspector to the writ alleged that Sec. 14.03(1) "and particularly the provision excluding private secondary schools from Class 'A' residence districts, is substantially related to the public welfare of the City of Wauwatosa and is therefore a proper and valid exercise of its police power." Both the answer and the return contained various factual allegations in support of the validity of the ordinance, which may be summarized as follows: (1) that the ordinance had been in force for over twenty-five years, whereas the relator's acquisition of the land was only recent; (2) that the relator's proposed high school would have a capacity of 500 students, of whom not more than thirty to forty would be residents of Wauwatosa and the remainder would come from neighboring communities, particularly the adjoining city of Milwaukee; (3) that the proposed high school site consists of thirteen acres whose natural use would be for a residential development that would substantially increase the taxable real estate value of the city and would produce large tax revenues for the city, whereas the erection of a private high school on the tract would remove the tract from the tax rolls and would also depreciate the taxable value of the expensive homes in the vicinity; (4) that the construction of the high school would result in traffic hazards and parking congestion; and that the use of the appurtenant athletic field with its attendant noises and night lights would tend to depreciate the value of surrounding residential property; (5) that the City of Wauwatosa already has adequate public high schools, none of which are located in "A" residential districts; (6) that secondary schools in congested residential districts result in physical damage to surrounding

residential property by reason of the trampling and littering of lawns, gardens and shrubbery; (7) that the construction of the high school would require the city to provide additional services such as traffic patrol, fire, health and building inspection, and that the saving in school maintenance on the part of the city would be insignificant as compared with the loss of revenue and increased cost to the city.

As appears from the foregoing, the method of raising the federal question now sought to be reviewed was by allegation in the petition for mandamus that the ordinance was unconstitutional and void; denial of such allegation in the return to the writ and the answer of the interpleaded defendant; and demurrer by the plaintiff to the return and the answer. The manner in which the federal question was passed upon by the trial court was by sustaining the plaintiff's demurrers to the return and the answer, and entering judgment in favor of the plaintiff. The manner in which the federal question was passed upon by the Supreme Court of Wisconsin was by reversing the judgment of the Circuit Court and directing that the writ of mandamus be quashed. The opinion handed down by the Supreme Court of Wisconsin addressed itself specifically and exclusively to the constitutional question, stating (267 Wis. at page 96, 65 N.W. 2d at page 46):

> "Respondent submits, therefore, that there is no difference in the effect on the community between the permitted public high school and the prohibited private one and hence the ordinance's discrimination between them is unreasonable, not founded on a difference in fact material to the object sought to be attained by building ordinances, and is a measure which denies to respondent the equal protection of the laws and deprives it of property without due process of law, contrary to the provisions of the

> Fourteenth amendment of the United States constitution. Therefore, it asserts, so far as this case is concerned, the ordinance is void."

The conclusion of the majority of the court (267 Wis. at page 101, 65 N.W. 2d at page 48) was —

> "that no unconstitutional or otherwise illegal discrimination appears in the Wauwatosa zoning ordinance by reason of its exclusion of private high schools from 'A' residence zones while accepting public schools of the same rank. Consequently, the refusal of appellant building inspector to issue a building permit for the erection of respondent's private high school was proper and must be sustained."

Two of the seven justices of the Wisconsin Supreme Court dissented, and in their dissenting opinion they concluded (267 Wis. at page 104, 65 N.W. 2d at page 50) —

> "that the barring of respondent's contemplated project by this zoning ordinance is discriminatory, arbitrary, and unreasonable and clearly violative of sec. 1, art. 1 of the Wisconsin constitution and contrary to art. 1 of the Fourteenth amendment of the federal constitution and therefore void."

(e) Substantial Character of the Federal Questions

That the federal questions involved in this case are so substantial as to require plenary consideration, with briefs on the merits and oral argument, is established by the following facts and considerations:

First, as to denial of the equal protection of the laws. The ordinance under attack permits public high schools but prohibits private high schools in an "A" residential area. The Wisconsin Supreme Court in its decision in this case admitted that this discrimination was not sus-

tainable on any of the grounds set out in the return of the defendant building inspector or the answer of the interpleaded defendant; namely, the traffic congestion, the crowds and bright lights at athletic contests, the increased tax burden by removal of the property from the city tax roll, and the diminution in value of neighboring homes. "Each such discordant feature", the court said (267 Wis. at page 96, 65 N.W. 2d at page 46) "attends the presence of a public school to an equal degree." But the court went on to discover and apply to the case before it an additional differentiation between the public and the private high school, which the court held to be a sufficient basis for the discrimination in the ordinance: namely, the fact that a public high school is open to everyone in the district of fit age and educational qualifications, while a private high school selects its students. On that ground alone, the Supreme Court of Wisconsin sustained the validity of the ordinance. The reasoning of the court appears from the following excerpts from its opinion (267 Wis. at page 98, 65 N.W. 2d at page 47):

> "Whether the private school is sectarian or commercial, though it now complains of discrimination, in its services it discriminates and the public school does not. Anyone in the district of fit age and educational qualifications may attend the public high school. It is his right. He has no comparable right to attend a private school. To go there he must meet additional standards over which the public neither has nor should have control. The private school imposes on the community all the disadvantages of the public school but does not compensate the community in the same manner or to the same extent. If the private school does not make the same contribution to public welfare this difference may be taken into consideration by the legislative body in framing its ordinance. If education offered by a school to the residents of an area without discrimination is con-

> sidered by the council to compensate for the admitted drawbacks to its presence there, that school may be permitted a location which is denied to another school which does not match the offer, and we cannot say that such a distinction is arbitrary or unreasonable or that such discrimination between the two schools lacks foundation in a difference which bears a 'fair, substantial, reasonable, and just relation' to the promotion of the general welfare of the community, which is the statutory purpose of zoning laws in general and of the ordinance in question."

This position taken by the Supreme Court of Wisconsin squarely raises the question whether a *zoning* ordinance, enacted in the exercise of the city's police power and finding its justification in the promotion of health, safety, morals or general welfare (*Euclid v. Amber Realty Co.*, 272 U.S. 365, 387, 395, 71 L.ed. 303, 310, 314, 47 Sup. Ct. 114, 118, 121), can constitutionally discriminate between private and public high schools solely on the ground that the public high school is open to everyone while the private high school selects its students. That difference might very well be germane to certain kinds of statutory differentiations, such for example as required curriculum or qualifications of teachers; but is it germane to the authorized purposes of a *zoning* regulation? Plaintiff earnestly contends that it is not, and that the Supreme Court of Wisconsin has confused two very different things when it sustains a discriminatory *police power* regulation on the basis of differences which have no relation whatever to the exercise of the police power.

The substantiality of the federal question with respect to denial of equal protection of the laws is further evidenced by the fact that every other state court of last resort that has spoken on the subject has found a discriminatory ordinance of this kind to be in violation of

the 14th Amendment. Certainly the federal objection to these ordinances must be admitted to be at least *substantial* when the courts of this country (other than the Wisconsin court) have found it, without dissent, to be *insurmountable*. The Supreme Court of Wisconsin admitted that two of these other cases are indistinguishable from the present case, saying (267 Wis. at pages 96-97, 65 N.W. 2d at page 46):

> "These are cases whose facts are practically identical with the present one. In them the respective courts held that there was no substantial difference between public and private schools in relation to the object sought to be accomplished by the zoning ordinance and therefore, in so far as it prohibited the presence of a private school while allowing a public one, it was void. If these decisions were controlling authority upon us we would necessarily affirm the learned trial court for we cannot distinguish them from ours in any material respect."

The two cases thus referred to by the Wisconsin court are *Catholic Bishop of Chicago v. Kingery* (1939), 371 Ill. 257, 20 N.E. (2d) 583, and *Miami Beach v. State ex rel. Lear* (1937), 128 Fla. 750, 175 So. 537. In the Illinois case a unanimous Supreme Court held that an ordinance which permitted public schools in an "A" residential district but prohibited private schools therein "bears no substantial relationship to the promotion of the public health, safety, morals or welfare" but constitutes on the contrary "a capricious invasion of the property rights of the appellee, and as such cannot be sustained." In the Florida case a unanimous Supreme Court, dealing with an ordinance which permitted public schools but prohibited private schools in a designated area, held that "the prohibited classification finds no foundation in reason or experience that has been brought to our attention." The

following further statement of the Florida court points up the present plaintiff's contention that the differences between a public and a private school, in order to sustain an ordinance that discriminates against the latter, must be not mere differences of educational policy or administration but must be germane to the exercise of the police power in the interest of public safety, health, morals or general welfare:

> "What objectionable characteristics touching the comfort or other general welfare of the surrounding community may obtain as to a private school which would not probably obtain in greater degree as to a public school has not been suggested, and, we think, for the very good reason that none exists. For this reason alone the ordinance as amended must be held to be arbitrary."

In addition to the Florida and Illinois cases which were acknowledged by the Wisconsin Supreme Court as authority squarely in favor of the plaintiff, there are three other cases equally in point and equally favorable to the plaintiff.

In *Phillips v. Homewood* (1951), 255 Ala. 180. 50 So. 2d 267, the court held that a city ordinance which permitted public schools but prohibited private schools in a particular area was unconstitutional as "an arbitrary and discriminatory classification", and further stated that "no case or authority to the contrary has been cited to us and we have found none."

In *State v. Northwestern Preparatory School* (1949), 228 Minn. 363, 37 N.W. 2d 370, an ordinance which permitted public and parochial schools but prohibited non-parochial private schools was held to violate the equal protection clause of the 14th Amendment. The court said:

> "While ownership, some of the subjects taught, and the discipline enforced may be different in each from

> what they are in the others, a private school has no effect upon a residential area different from that of a public or parochial one. The distinction is based solely upon ownership. Such a distinction bears no relation to the purposes of the ordinance, and for that reason is arbitrary."

The third case, *Roman Catholic Welfare Corporation of San Francisco v. Piedmont*, 278 Pac. 2d 943, was decided by the District Court of Appeal of California on January 24, 1955 but is not yet reported. The court held that a zoning ordinance of the City of Piedmont which prohibited the conduct of any school except a public school in "Zone A" was unconstitutional as against a Roman Catholic organization which desired to erect a parochial school on real estate owned by it in "Zone A." The court said:

> "It is settled that parents have the basic constitutional right to have their children educated in schools of their own choice, subject to reasonable regulations as to subjects required to be taught, manner of instructions, etc. (Pierce v. Society of Sisters, 268 U.S. 510). Having this basic right in mind no reasonable ground for permitting public schools to be conducted in Zone A and prohibiting all other schools teaching the same subjects to the same age groups can be suggested. The question has not before been passed upon by the California courts but the courts of other jurisdictions have been unanimous in striking down similar legislation. [Citations] The rationale of these decisions is that no reasonable basis of classification exists between, or among, schools furnishing the same type of education to the same class of students."

If all these courts in five states have found it impossible to sustain an ordinance similar to the one here under attack, as against the requirement of equal protection of the laws in the 14th Amendment, certainly it cannot be

doubted that the federal question with respect to the validity of this ordinance is at least sufficiently "substantial" to warrant examination and decision by the Supreme Court of the United States—particularly when it is noted that the Wisconsin decision here appealed from is the only one in which such an ordinance has ever been held valid.

In addition to the federal question arising by reason of the denial of equal protection of the laws, the present litigation involves a further substantial federal question as to whether the absolute prohibition of a private high school in an "A" residential district does not deprive the relator of property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. A case squarely in point on that subject is *Roman Catholic Archbishop v. Baker* (1932), 140 Ore. 600, 15 Pac. 2d 391, involving a denial of a building permit for the erection of a parochial school in a residence district. The Supreme Court of Oregon unanimously held that the denial of the permit was an arbitrary deprivation of property, saying:

> "The right to own carries with it the right to use that property in any manner that the owner may desire so long as such use will not impair the public health, peace, safety or general welfare. The kind of school proposed to be erected will not interfere with the public health; it cannot affect the public peace; it surely will not endanger the public safety; and by all civilized peoples an educational institution, whose curriculum complies with the state law, is considered an aid to the general welfare. These propositions cannot be successfully disputed. It is not a question alone of what monetary damage plaintiff may sustain, but also a question of the invasion of one of the plaintiff's inherent rights."

If exclusion of a private school from a particular district in a city is permissible, it is only a short step to the exclusion of such a school from the city as a whole. That such exclusion would be unconstitutional as a violation of the due process clause of the 14th Amendment was specifically held by the Supreme Court of Michigan in *Mooney v. Orchard Lake* (1952), 333 Mich. 389, 52 N. W. 2d 308, with abundant citation of supporting authority. The same conclusion has been reached with regard to the closely related subject of the exclusion of churches from a residential district. Leading cases are *State ex rel. Synod of Ohio v. Joseph* (1942), 139 Ohio St. 229, 39 N.E. 2d 515, and *State ex rel. Roman Catholic Bishop of Reno v. Hill* (1939), 59 Nev. 231, 90 Pac. 2d 217. In both of these cases the complete prohibition of churches in a particular area was expressly held to be in violation of the due process clause of the 14th Amendment, as against the religious organizations who owned land on which they desired to erect churches.

The proposition that a zoning ordinance which bears no substantial relation to the public health, safety, morals or general welfare is unconstitutional as a taking of property without due process has been affirmed in many cases, of which perhaps the most recent is *American University v. Prentiss* (1953), 113 Fed. Supp. 389, affirmed in *Prentiss v. American University* (1954), 214 Fed. 2d 282, certiorari denied on December 6, 1954 in *Wrather v. American University*, 75 Sup. Ct. 217.

In the light of these authorities it is submitted that the federal question under the due process clause, as well as the federal question under the clause relating to equal

protection of the laws, is a substantial question justifying the entertainment of the present appeal by the court.

Respectfully submitted,

ERNST J. VON BRIESEN,
135 West Wells Street,
Milwaukee 3, Wisconsin,

RALPH M. HOYT,
735 North Water Street,
Milwaukee 2, Wisconsin,

Attorneys of Record for Appellant.

VON BRIESEN & REDMOND,
C. R. DINEEN,
Milwaukee, Wisconsin,
Of Counsel.

APPENDIX "A"

(h) Copies of Opinions

There is appended hereto, a copy of the majority opinion of the Supreme Court of the State of Wisconsin delivered upon the rendering of the judgment reversing the orders and judgment of the lower court and sustaining the validity of the ordinance in question, together with a copy of the dissenting opinion of Justice Steinle, in which Justice Broadfoot concurred. There was no opinion delivered by the Court in connection with the rendering of the order denying the motion for rehearing.

There is also appended, a copy of the opinion and decision of Otto H. Breidenbach, Judge of the Circuit Court of Milwaukee County, Wisconsin, delivered upon the rendering of the order denying the motion of Appellee, Sinar, to quash the Alternative Writ of Mandamus; and opinion and decision of William C. O'Connell, Judge Presiding, of the Circuit Court of Milwaukee County, Wisconsin, delivered upon the rendering of the order sustaining Appellant's demurrers to the return of the Appellee, Sinar, and to the answer of the Appellee, Vanderjagt; and granting to Appellant the relief demanded in its petition.

STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1953

No. 263

STATE ex rel WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,

Respondent,

v.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa,

Appellant,

E. L. VANDERJAGT,

Interpleaded Defendant.

APPEAL from orders and a judgment of the circuit court for Milwaukee county: WILLIAM C. O'CONNEL, Circuit Judge. *Reversed.*

Action in mandamus brought by plaintiff-respondent which is a private, non-profit corporation and, for the purposes of this opinion, is an owner of land in a class "A" residence zone of the city of Wauwatosa. Its action sought to compel the defendant-appellant Sinar, as building inspector of the city, to issue a permit for the construction of plaintiff's private high school with appurtenant athletic grounds and facilities. The building inspector had previously denied an application for such permit on the ground that the proposed use of the premises is not allowed by the zoning law of the city of Wauwatosa which he has the duty to administer. He filed a motion to quash

the alternative writ and, after hearing, the motion was denied by Otto H. Breidenbach, circuit judge, but with leave to file a return to the writ, which was done. In the meantime, E. L. Vanderjagt, a Wauwatosa resident, property owner and taxpayer, was interpleaded and filed an answer to plaintiff's petition. Plaintiff interposed a general demurrer to both the return and the answer.

After a hearing the demurrers were sustained and an order entered directing the entry of judgment and the issuance of a peremptory writ of mandamus. Judgment was entered and the writ issued but execution stayed pending appeal. Defendants appeal from the order denying the motion to quash, the order sustaining the demurrers, and from the judgment entered and docketed on the 10th day of December, 1953. At present there is no high school, public or private, in the class "A" residence zone.

Other material facts will be stated in the opinion. For convenience the arguments advanced by the defendants severally will be treated as though made jointly.

BROWN, J. Ch. 62, Stats. is the General Charter Law for the government of cities below the first class. The city of Wauwatosa is a city of the third class and is subject to ch. 62. Sec. 62.23(7), pars. (a), (b), and (c), Stats. grants to cities the power to zone their areas, as follows:

> "(a) *Grant of power.* For the purpose of promoting health, safety, morals or the general welfare of the community, the council may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes pro-

vided that there shall be no discrimination against temporary structures. This subsection and any ordinance, resolution or regulation, heretofore or hereafter enacted or adopted pursuant thereto, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated. It shall not be deemed limitation of any power elsewhere granted.

"(b) *Districts.* For any and all of said purposes the council may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings and for the use of land throughout each district, but the regulations in one district may differ from those in other districts.

"(c) *Purposes in view.* Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

Pursuant to this authority the common council of Wauwatosa adopted a zoning ordinance whose provisions, material to this action, are as follows:

"5. That Section 14.03(1) of said Zoning Code defines 'A' Residence District Regulations as follows:

"(1) Use: No building or premises shall be used and no building shall be hereafter erected or altered within any 'A' Residence District, unless otherwise provided in this ordinance, except for the following uses:

"(a) Single Family Dwellings.

* * *

"(e) Public Schools and Private Elementary Schools."

The constitutionality of the general power of the state to zone property in the public interest is well established. It is a police power and it may be delegated by the state to the cities. *State ex rel. Tingley v. Gurda* (1932), 209 Wis. 63, 243 N.W. 317, *State ex rel. Carter v. Harper* (1923), 182 Wis. 148, 196 N.W. 451. Like other examples of regulation under the police power, a specific zoning ordinance must meet the constitutional demands of due process and the equal protection of the law. It must "* * * provide those in similar circumstances, among whom no reasonable basis for distinction exists, with equal protection of the law, as is constitutionally required of all ordinances as well as statutes." 8 McQuillin, Mun. Corp. (3d ed.), p. 106, sec. 25.61.

Reference to sec. 14.03(1)(e) of the ordinance discloses that the erection of public high schools is permitted and the erection of private schools above the elementary rank is forbidden in the "A" residence district. The defendant inspector relied on this prohibition in refusing to issue a building permit to the plaintiff.

The power to zone is granted to cities in order to promote the "health, safety, morals or the general welfare of the community." Sec. 62.23(7)(a), Stats., *supra*. We have recognized that the term "general welfare" includes considerations of public convenience, and general pros-

perity. *State ex rel. Carter v. Harper, supra.* The means adopted to promote these ends must, of course, bear a reasonable relation to the declared purpose. Id., p. 152. *Nectow v. Cambridge,* (1928), 277 U.S. 183, 48 Sup. Ct. 477, 72 L. Ed. 842. Appellants have made it abundantly clear that respondent's projected school has many features which seriously impair the social and economic benefits to the entire community which the zoning law is designed to preserve and promote. It will add to the congestion of the surrounding streets. Athletic events will bring noisy crowds and if the contests are held at night, there will be bright lights to interfere with the peace and comfort of the neighborhood. The school property will be taken from the tax roll, thus increasing the financial burden of the city's taxpayers. The presence of the school will lessen the taxable value of nearby homes and will deter the building of new homes in the area. Other detriments are easily thought of. But, as respondent points out, each such discordant feature attends the presence of a public school to an equal degree.

Respondent submits, therefore, that there is no difference in the effect on the community between the permitted public high school and the prohibited private one and hence the ordinance's discrimination between them is unreasonable, not founded on a difference in fact material to the object sought to be attained by building ordinances, and is a measure which denies to respondent the equal protection of the laws and deprives it of property without due process of law, contrary to the provisions of the Fourteenth Amendment of the United States Constitution. Therefore, it asserts, so far as this case is concerned, the ordinance is void.

" * * * a classification to be valid must always rest on a difference which bears a fair, substantial, natural, reason-

able, and just relation to the object, act, or persons in respect to which it is proposed." 12 Am. Jur., Constitutional Law, p. 153, sec. 481. Respondent cites *Catholic Bishop of Chicago v. Kingery* (1939), 371 Ill. 257, 20 N.E. (2d) 583, and *Miami Beach v. State ex rel. Lear* (1937), 128 Fla. 750, 175 So. 537. These are cases whose facts are practically identical with the present one. In them the respective courts held that there was no substantial difference between public and private schools in relation to the object sought to be accomplished by the zoning ordinance and therefore, in so far as it prohibited the presence of a private school while allowing a public one, it was void. If these decisions were controlling authority upon us we would necessarily affirm the learned trial court for we cannot distinguish them from ours in any material respect. But their authority is persuasive, only, and it fails to persuade.

The subject of public education and the establishment and operation of public schools is a governmental function of this state. Art. X, Wis. Const. Chs. 36 to 42, Stats. The City School Plan, secs. 40.50 to 40.60, Stats., has made the city the municipal entity for the administration of school affairs of those cities which have come under it, as the city of Wauwatosa has done. *State ex rel. Board of Education v. Racine* (1931), 205 Wis. 389, 236 N.W. 553. In the performance of other governmental functions we do not restrict the behavior of persons or the use of property to the same extent that we do when only private interests are pursued and the fact that the standards are different commonly raises no suspicion that an illegal discrimination is thereby imposed or that the difference between municipality and citizen is insufficient to support separate classifications. For example, who considers he has a right to ignore speed laws because they need not be

observed by the fire department responding to a call? Sec. 85.40 (5). Nor is the state controlled by a building requirement which an individual must observe. *Milwaukee v. McGregor* (1909), 140 Wis. 35, 121 N.W. 642. It may be that the essential differences between government and governed are so great that the two are in different classes *per se* at any time when governmental functions are involved and no ordinance is void by reason of discrimination, alone, merely because it gives a preference to the government, acting in its governmental capacity, which it withholds from private corporations or individuals.

However, we decide the present appeal on the narrower ground that tangible differences material to the classifications of the ordinance can be readily pointed out which sustain the distinction made by the ordinance between the schools. To begin with, the term "public" is the antithesis of "private". The public school is not a private one. They serve different interests and are designed to do so. The private school is founded and maintained because it *is* different. Is that difference material to the purpose of zoning? In many respects the two schools perform like functions and in probably all respects concerning noise, traffic difficulties and the other objectionable features already mentioned they stand on an equality, so that in several of the objects of zoning ordinances, — the promotion of health, safety and morals, as laid down by sec. 62.23 (7) (a), Stats., and developed by respondent's brief, we may not say that the two schools differ. But when we come to "the promotion of the general welfare of the community", — "Ay, there's the rub." The public school has the same features objectionable to the surrounding area as a private one, but it has, also, a virtue which the other lacks, namely, that it is

located to serve and does serve that area without discrimination. Whether the private school is sectarian or commercial, though it now complains of discrimination, in its services it discriminates and the public school does not. Anyone in the district of fit age and educational qualifications may attend the public high school. It is his right. He has no comparable right to attend a private school. To go there he must meet additional standards over which the public neither has nor should have control. The private school imposes on the community all the disadvantages of the public school but does not compensate the community in the same n ner or to the same extent. If the private school does . t make the same contribution to public welfare this difference may be taken into consideration by the legislative body in framing its ordinance. If education offered by a school to the residents of an area without discrimination is considered by the council to compensate for the admitted drawbacks to its presence there, that school may be permitted a location which is denied to another school which does not match the offer, and we can not say that such a distinction is arbitrary or unreasonable or that such discrimination between the two schools lacks foundation in a difference which bears a "fair, substantial, reasonable and just relation" to the promotion of the general welfare of the community, which is the statutory purpose of zoning laws in general and of the ordinance in question.

While we have not found any decisions sustaining the public vs. private distinction between schools in zoning cases and respondent has found two to the contrary, *supra*, it has not been difficult to find supporting examples in other activities. Thus, an ordinance permitted only municipal parks in a residence district. A property owner set up a bathing beach ostensibly run as a private

club but actually open to the public. He asserted that it was a park and that there was an illegal discrimination by the ordinance which permitted a municipal park but not a private one. The court said: "There is nothing unreasonable in the classification that makes a distinction between municipally owned and privately owned playgrounds and parks." *McCarter v. Beckwith* (1936), 247 App. Div. 289, 285 N.Y. Supp. 151, 154. The decision was affirmed without opinion, 272 N.Y. 488, 3 N.E. (2d) 882, and was denied certiorari 299 U.S. 601, 57 Sup. Ct. 193, 81 L. Ed. 443.

In *Golf, Inc. v. District of Columbia* (C.C.A.D.C. 1933), 67 Fed. (2d) 575, a corporation established a driving range in a residential area. The ordinance prohibited this activity although it would have been permitted if conducted under public auspices. The corporation contended that the zoning ordinance was void because it made an unreasonable classification. The decision rested on the distinction between public benefit and a more restricted advantage which we make in the instant case.

The headnote states:

> "Zoning regulations *held* not discriminatory because permitting use of lands in residential districts for public recreational purposes while denying to private individuals similar use, * * * "

In the opinion on p. 577 the court said:

> "It is also contended by the corporation that the regulations are discriminatory in that they permit the use of lands in residential zones in the District of Columbia for public recreational purposes, but deny a similar use to private individuals.
>
> "We cannot agree with this contention. A use of public parks or recreational grounds in a residential

> area for the common benefit of all the people of the District is not to be compared with the use of lands by a private corporation for its exclusive profit in a manner forbidden by the zoning regulations."

In *Cincinnati v. Wegehoft* (1928), 119 Ohio 136, 162 N.E. 389, an effort was made to enjoin the city from building a fire house in an area zoned for residential purposes only, except that the ordinance provided that the city was exempt from such restriction as far as the erection of its own municipal buildings was concerned. The court held that this discrimination did not violate the state and federal constitutions.

Even more persuasive is our own leading case on zoning ordinances, *State ex rel. Carter v. Harper, supra.* The ordinance there under consideration contained a provision which allowed a public service corporation, upon a finding of public necessity and convenience, to erect buildings and put its property to use in its business in *any* zone. We said, at p. 162:

> "* * * It must be apparent that an ordinance enacted pursuant to state authority which prevents the erection of buildings or the conduct of business deemed inimical to public interest need not also prohibit the erection of buildings or the conduct of business which is essential to the comfort and convenience of the public and which the duly constituted authority of the state determines to be necessary for the public service which a public utility is required to render. * * *"

The private corporation, because affected by the public interest, was enabled to conduct activities in zones where similar industries not so affected were forbidden to operate. If such preferential treatment of a mere private corporation did not invalidate the ordinance because of

the public interest in the utility, how much stronger is the position of the appellants whose contention rests on an ordinance which gives the preference to the public,—the municipality,—itself! We consider the authority very strong in support of the conclusion which we have already reached independently, that no unconstitutional or otherwise illegal discrimination appears in the Wauwatosa zoning ordinance by reason of its exclusion of private high schools from "A" residence zones while accepting public schools of the same rank. Consequently, the refusal of appellant building inspector to issue a building permit for the erection of respondent's private high school was proper and must be sustained.

By the Court. Orders and judgment reversed. Cause remanded with directions to quash the writ of mandamus.

STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1953

No. 263

STATE EX REL WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,

Respondent,

v.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa,

Appellant,

E. L. VANDERJAGT,

Interpleaded Defendant.

STEINLE, J. (dissenting) The ordinance in question permits the establishment and operation of a public high school within the prescribed zone, but prohibits the erection and conducting of a private high school therein.

The majority say that since there is a substantial distinction between public and private schools in that particularly the public school must serve all, whereas the private school restricts admission, there is no illegal classification under the ordinance, and that the discrimination resulting therefrom is not unreasonable.

Zoning regulations are foundationed on police power. The ultimate purpose of zoning is associated with public health, safety, morals and general welfare.

In *State v. Withrow* (1938), 228 Wis. 404, 280 N.W. 364, this court held that the scope of the police power is confined to the enactment of regulations to promote the public health, safety and welfare.

In *Geisenfeld v. Shorewood* (1939), 232 Wis. 410, 287 N.W. 683, it was held that a zoning ordinance is unconstitutional and void if it is arbitrary and unreasonable and has no substantial relationship to the public health, safety, morals or general welfare of a municipality.

In *State ex rel Ford Hopkins Co. v. Mayor* (1937), 226 Wis. 215, 276 N.W. 311, the court said that in the exercise of police power all classifications must be based upon substantial distinctions which makes one class really different from another.

The primary purpose of our high schools, private or public, is to educate pupils of a particular age. The state is interested to have all such children so educated in order that they may become good citizens. Private high schools as well as public high schools promote the general welfare and there is no substantial distinction in the purpose which they serve. If the private high schools did not exist, the public would be obliged to furnish facilities for those attending the private institutions.

In 47 *Am. Jur.*, Schools, p. 459, sec. 220, the following observation is made:

> " * * * the only difference between a public and private school is that one is organized and maintained as one of the institutions of the state, whereas the other is maintained by private individuals or corporations."

The placement of a private high school in the area in question here would no more offend or interfere with the health, safety, morals and general welfare of the com-

munity than would the presence of a public high school which the city authorities under the ordinance are permitted to erect in the zoned section. As was well said in the case of *Catholic Bishop of Chicago v. Kingery* (1939), 371 Ill. 257, 259, 20 N.E. (2d) 583 at 584:

> "We fail to perceive to what degree a Catholic School of this type will be more detrimental or dangerous to the public health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are any more likely to jeopardize the public safety than the public school pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare. As a matter of fact such a school, conducted in accordance with the educational requirements established by State educational authorities, is promotive of the general welfare."

Other cases holding ordinances of this type invalid on the basis of improper classification are: *Miami Beach v. State ex rel. Lear* (1937), 128 Fla. 750, 175 So. 537; *Lumpkin v. Township Committee of Bernards* (1946), 134 N.J.L. 428, 48 Atl. (2d) 798; *Roman Catholic Archbishop of Oregon v. Baker* (1932), 140 Or. 600, 15 Pac. (2d) 391; *State ex rel. Synod of Ohio of United Lutheran Church v. Joseph* (1942), 139 Ohio St. 229, 39 N.E. (2d) 515; *Women's Kansas City St. Andrew Society v. Kansas City* (8th Cir. 1932), 58 Fed. (2d) 593; *State v. Northwestern Preparatory School* (1949), 228 Minn. 363, 37 N.W. (2d) 370; *Phillips v. Homewood* (1951), 255 Ala. 180, 50 So. (2d) 267; *Yanow v. Seven Oaks Park, Inc.* (1953), 11 N.J. 341, 94 Atl. (2d) 482. See also 8 *McQuillin, Mun. Corp.* (3d ed.), p. 40, sec. 25.15.

It is a rule, as pointed out by the majority, that valid classification for zoning may be based on distinctions between municipal and private property and activities. However, it is significant that the courts of the country

in zoning cases have treated private school situations differently than other endeavors of private enterprise. In the field of education the courts in zoning cases have made an exception to the rule and have not distinguished as between private and public schools. There is good reason for such exception.

Cases cited by the majority, to-wit: *McCarter v. Beckwith* (1936), 285 NYS 151, 3 N.E. (2d) 882 and *Golf, Inc. v. District of Columbia* (1933), 67 Fed. (2d) 575 involve a privately owned park and a privately owned golf driving range, respectively. It seems, however, that there is a substantial distinction between schools and places of recreation. Private schools must comply with state standards in matters of education. Privately owned recreation places need not so comply. By law, schooling is required to a particular age. The state permits such schooling in either public or private establishment. It does not require recreation to be taken in either park or golf range. The private park or golf range is a profit making venture. In the instant situation the owner of the land who petitions for the building permit is a non profit organization.

Since it appears that the private high school which respondent desires to erect on its land in the zoned area is in the same category as the public high schools of Wauwatosa, and of the type which that municipality is free to erect in the zoned section, and that such private high school would serve the same purpose of educating the children of the community and vicinity as do the public high schools of that city, I am forced to the conclusion that the barring of respondent's contemplated project by this zoning ordinance is discriminatory, arbitrary and unreasonable and clearly violative of sec. 1, art. 1, of the Wisconsin Constitution and contrary to art. 1 of the Four-

teenth Amendment of the Federal Constitution and therefore void. I would affirm the judgments of the circuit court.

I am authorized to say that Mr. Justice Broadfoot joins in this dissent.

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
CASE NO. 244-270

STATE OF WISCONSIN, ex rel. WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,
Plaintiff,

vs.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa, Wisconsin,
Defendant.

DECISION

This is an action in mandamus directed to defendant, Sid H. Sinar, Inspector of Buildings of the City of Wauwatosa, Wisconsin, commanding him to issue permits for the construction of a private high school which plaintiff seeks to erect upon property described in the complaint situated in the City of Wauwatosa in an "A" residence district of said City or that he show cause to the contrary. Defendant before the expiration of the time for making return to the alternative writ moved to quash the alternative writ of mandamus issued herein for the "reason that neither the petition herein nor said alternative writ state facts showing that the Wisconsin Lutheran High School Conference is entitled to a writ of mandamus as prayed".

The sole question presented for determination upon the complaint and the motion to quash is as to the constitutionality of that portion of the zoning ordinance of the City of Wauwatosa relating to the validity of section 14.03 (1) (e) of the Wauwatosa Zoning Code which defines "A" Residence District Regulations. The pertinent provision relating to the matter under consideration provides:

> "Subsection (1) Use: No building or premises shall be used and no building shall be hereafter erected or altered within any "A" Residence District, unless otherwise provided in this ordinance, except for the following uses:
>
> (e) Public Schools and Private Elementary Schools."

It is plaintiff's contention that the above provision which only permits the erection of private elementary schools while permitting the erection of public schools (both elementary and high schools) is invalid because it is unreasonable and discriminatory.

To justify the discrimination with respect to private high schools, it must be made to appear that such classification bears a substantial relationship to public health, safety, morals or general welfare. The exercise by the Common Council of its right to pass zoning regulations rests upon the statutory declaration that it must be "for the purpose of promoting health, safety, morals or the general welfare of the community". Section 62.23 (7) (8) Wis. stats.

In *Nectow vs. City of Cambridge,* 277 U.S. 183, the Court in considering this question said:

> " * * * The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not

> unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. * * * ."

Plaintiff in support of its contention that the exclusion of private secondary schools from an "A" Residence District bears no relation to the public health, safety, morals or general welfare has cited the case of *City of Miami Beach vs. State ex rel. Lear,* 128 Fla., 750, 175 So., 537 (1937). In declaring the zoning ordinance void which prohibited private schools in a restricted district, which permitting public schools, the Court said:

> "It will be noted that the ordinance as amended specifically permits the conducting of public schools within the prescribed zone and prohibits the conducting of private schools of all sorts therein. The prohibiting classification finds no formulation or basis in reason or experience that has been brought to our attention. What objectionable characteristics touching the comfort or other general welfare of the surrounding community may obtain as to a private school which would not probably obtain in greater degree as to a public school has not been suggested, and, we think, for the very good reason that none exists. For this reason alone the ordinance as amended must be held to be arbitrary."

In *Catholic Bishop of Chicago vs. Kingery,* 371 Ill., 257, the Court, in declaring an ordinance invalid because of unreasonable discrimination between public and private schools, said:

> "We fail to perceive to what degree a Catholic school of this type will be more detrimental or dangerous to the public health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are any more likely to jeopardize the public safety than the public school

pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare. As a matter of fact such a school, conducted in accordance with the edcational requirements established by State educational authorities, is promotive of the general welfare."

Further leading cases holding discriminatory ordinances invalid and unconstitutional for similar reasons are the following:

Roman Catholic Archbishop of Oregon vs. Baker, 140 Ore. 600, 15 Pa. 2nd, 391 (1932)

State ex rel. Synod of Ohio of United Lutheran Church vs. Joseph, 139 Ohio St. 229, 32 N.E. 2nd 515 (1942)

Women's Kansas City St. Andrew Society vs. Kansas City, 59 Fed. 2nd, 593 (1932)

Village of University Heights vs. Cleveland Jewish Orphans Home, 20 Fed. 2nd 743, 54 A.L.R. 1008 (1927)

The rule is well established that "zoning ordinances must be uniform and equal in operation and effect, and provide those in similar circumstances among whom no reasonable basis for distinction exists, with equal protection of the law, as is constitutionally required of all ordinances as well as statutes. The classification may and must be reasonable". (McQuillin on Municipal Corporations, 3rd Ed., vol. 8, sec. 25.61)

It must be held that the ordinance of the City of Wauwatosa in question which permits the erection of public schools, both primary and secondary, and permits the erection of private schools elementary only violates the principle that ordinances "must be uniform and equal in

operation and effect" and fails to provide "those in similar circumstances, among whom no reasonable basis for distinction exists, equal protection of the law" as is constitutionally required of all ordinances.

It is further my conclusion that the portion of the ordinance in question (and that portion only) to-wit: Section 14.03 (1) (e) must be held to be invalid because unfairly discriminatory and arbitrary for the reason that the classification bears no substantial relationship to public health, safety, morals or the general welfare as required by statute.

Schools have usually been held suitable in a residence zone; not detrimental thereto.

In *Livingston et al vs. Davis et al.*—Iowa, 15 N.W. 2nd, 592, 27 A.L.R. 2nd, 1237 (1951) the Court stated:

> "Schools have usually been held suitable in a residence zone, not detrimental thereto, and courts have frowned on efforts to remove them therefrom."
>
> *Yokley, Zoning Law & Practice,* sec. 161, pages 317, 318
>
> *Langbein vs. Board of Zoning Appeals,* 135 Conn. 575, 67 Atl. 5, 7.

Defendant seeks to justify the discrimination upon the ground that the "public high schools in Wauwatosa are under the jurisdiction of a Public School District * * * which is a separate legal entity", and is referred to as "a quasi municipal corporation". It is further contended by defendant that the "School District has certain powers and prerogatives with respect to schools with which the municipal government may not interfere". Defendant cites in support of his position the case of *State ex rel. Carter vs. Harper,* 182 Wis. 148.

I am of the opinion that the grounds relied upon by defendant for the obvious discrimination of the ordinance are invalid-and must be rejected.

The petition for an alternative writ of mandamus and said alternative writ state facts showing that the Wisconsin Lutheran High School Conference is entitled to a writ of mandamus.

Defendant's motion to quash the alternative writ is denied. Dated, June 4, 1953.

Otto H. Breidenbach,
Circuit Judge.

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
CASE NO. 244-270

STATE OF WISCONSIN, ex rel WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,
Plaintiff,

vs.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa, Wisconsin,
Defendant,

E. L. VANDERJAGT,
Interpleaded Defendant.

OPINION AND DECISION

The case before the Court is an action in mandamus in which the plaintiff seeks to compel the defendant, Sid H. Sinar, Inspector of Buildings of the City of Wauwatosa, Wisconsin, to issue a permit for the construction of a private high school which plaintiff desires to build in an "A" Residence District in the City of Wauwatosa. The permit was denied on the ground that the application did not conform to the City zoning laws.

The City has made a return to the alternative writ of mandamus, and the interpleaded defendant, E. L. Vanderjagt, has filed an answer.

The plaintiff demurred to both the return and the answer on the ground that it appears on the face of each

pleading that such pleading does not state facts sufficient to constitute a defense.

The answer of the interpleaded defendant, Vanderjagt, in paragraph 1 admitted the allegations of paragraphs 1, 2, 3, 4, and 5 of the plaintiff's petition, and denied and alleged as follows:

2. Denies upon information and belief that the plaintiff has an interest in the premises described in paragraph 6 of plaintiff's petition, and alleges on information and belief that the plaintiff will have an interest in the premises only if it is granted a permit to erect a private secondary school and athletic field.

3. Alleges that the City zoning code was enacted in 1929, and since that time the premises in question have been in an "A" Residence District.

4. Alleges that the sole reason the defendant refused to issue a permit was because of a non-compliance with Sec. 14.03 (1) of the zoning code of the City of Wauwatosa.

5. Alleges that the erection of a secondary private school and athletic field will not be for the purpose of educating the children of taxpayers and residents of Wauwatosa, but rather for the benefit of persons residing outoutside of Wauwatosa.

6. Alleges that the erection of a secondary private school and athletic field will not promote the public health, safety, or general welfare of the City of Wauwatosa.

7. Alleges that the denial of plaintiff's petition will not deprive the plaintiff of rights in said property because the plaintiff knew that such property was so zoned for

25 years prior to the time that the plaintiff acquired a contract interest in such property.

As an affirmative defense the interpleaded defendant alleged:

1. That allegations 1 to 7 of this answer are realleged.

2. That the interpleaded defendant and others adjacent to the premises involved herein spent $22,000 to $75,000 for their homes, and the total valuation of the homes in the immediate vicinity of the land in question is in excess of one million dollars.

3. That Wauwatosa has a population of 35,000 people, and has a public high school, and two junior high schools, and an athletic field, in a "B" District, and proposes to build another junior high school in a "B" District.

4. That the zoning code permits the erection of a private high school in a "B" District and in all other Districts except an "A" District.

5. That the high school proposed to be erected will have an approximate enrollment of 500 pupils, of which 30 or 40 will reside in Wauwatosa, and the balance will reside outside of the City of Wauwatosa.

6. That the plaintiff proposes to use the athletic field for night football games and events.

7. That parents of the pupils and others will avail themselves of the facilities of the proposed high school.

8. That increased traffic and parking will result, and confusion in the streets will interfere with adequate transportation.

9. That the surrounding property is adapted for "A" residences, and the proposed school and athletic field will

not encourage the most appropriate use of such adjoining land.

10. That no public high school is located in an "A" District and none will be erected.

11. That the proposed high school and athletic field will be primarily for the benefit of communities other than Wauwatosa and will be under exclusive control of the plaintiff.

12. That the City of Wauwatosa has distributed the burdens of an athletic field and high school in separate locations in a "B" area, whereas the plaintiff will use one location only for both.

13. That additional municipal services will be required if this property is used as prayed for in the petition, and this will be detrimental to a Class "A" District because of depreciated property values and so forth.

The return of the Building Inspector, the defendant herein, was substantially in accordance with the answer of the interpleaded defendant, although such return of the Building Inspector also shows as follows:

1. Admits that the plaintiff has a contract to purchase such real estate.

2. Shows details of development of property in Wauwatosa, and alleges that Wauwatosa might add $2,250,000 of taxable value to the City tax roll if the plaintiff's property was sold for lots, and that this might mean $61,875 additional taxes yearly.

3. That a secondary school located in a residence district results in physical damages to surrounding residence property by reason of trampling and littering of lawns, gardens, and shrubbery.

Many statements in the answer and the return are purely speculative as to the future and are apparently based on what is presumed to take place in the future in case the plaintiff's high school is built.

Many statements outside of the record made in the briefs of the attorneys are not mentioned herein because not applicable. The same is true of certain legal authorities cited in the briefs.

LAW

In *Madregano vs. Wisconsin Gas and Electric Co.*, 181 Wis. 611, it was held that on a demurrer being made to an answer all of the allegations of the answer must be taken as true.

Sec. 263.17, Wis. Stats., holds that pleadings must be given liberal constructions when demurrers are made to such pleadings.

Section 14.03 (1) of the zoning ordinance of the City of Wauwatosa defines the uses which are permitted in an "A" Residence District, and subsection (e) of said section reads as follows: "Public Schools and Private Elementary Schools."

Subsections (7) (a), (b), and (c) of Sec. 62.23, Wis. Stats., are involved herein, and provide as follows:

> "(a) *Grant of power.* For the purpose of promotion of health, safety, morals or the general welfare of the community, the council may by ordinance, regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes pro-

vided that there shall be no discrimination against temporary structures. This subsection and any ordinance, resolution or regulation, heretofore or hereafter enacted or adopted pursuant thereto, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated. It shall not be deemed limitation of any power elsewhere granted.

"(b) *Districts.* For any and all of said purposes the council may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings and for the use of land throughout each district, but the regulations in one district may differ from those in other districts.

"(c) *Purposes in view.* Such regulation shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

Sec. 14.04 (1) of the Zoning Ordinance permits colleges and private secondary schools in a "B" Residence District.

Sec. 14.23 of the Zoning Ordinance provides that the provisions of the ordinance are severable.

277 U.S. 183, *Nectow vs. City of Cambridge,* at page 188, contains this statement:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

City of Miami Beach vs. State ex rel Lear, 128 Fla. 750, 175 So. 537, contains this statement:

> "The prohibiting classification finds no formulation or basis in reason or experience that has been brought to our attention. What objectionable characteristics touching the comfort or other general welfare of the surrounding community may obtain as to a private school which would not probably obtain in greater degree as to a public school has not been suggested, and, we think for the very good reason that none exists."

371 Ill. 257, 20 N.E. 2d 583, *Catholic Bishop of Chicago vs. Kingery,* contains this statement at page 584:

> "We fail to perceive to what degree a Catholic school of this type will be more detrimental or dangerous to the public health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are any more likely to jeopardize the public safety than the public school pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare."

140 Ore. 600, 15 P. 2d 391, *Roman Catholic Archbishop of Oregon vs. Baker,* contains this statement at page 391:

> "The kind of school proposed to be erected will not interfere with the public health; it cannot affect the public peace; it surely will not endanger the public safety; and by all civilized people an educational state law is considered an aid to the general welfare."

McQuillin on Municipal Corporations, 3d Ed. Volume 8, Sections 25.61, 25.99, 25.122, 25.123, and Section 195, hold generally that provisions of zoning ordinances must be uniform and equal in operation as applied to those in similar circumstances among whom no reasonable basis for distinction exists.

Rathkopf, the Law of Zoning and Planning, 2d Ed. contains the following statements:

> "Zoning is an exercise of the police power. The police power furnishes the basis for imposing reasonable zoning restrictions uniformly applicable within a given area, affecting the uses to which the property within such area may be put."
>
> "Any doubt as to the constitutionality is construed strictly against the municipality.
>
> "When the exercise of the police power is proper and reasonable, resulting damage to one's property is one of the prices the individual must pay as a member of society, to the end that the general welfare of the community may be served."

79 N.Y. Supp. (2), *Hickox vs. Griffin,* at page 195, contains a statement to the effect that an equitable owner of real estate is an interested party and a proper party to an action or a proceeding.

37 N.W. 2d 370 (1949), *State vs. Northwestern Preparatory School, Inc., et al,* was a case involving a Minnea-

polis zoning ordinance which allowed public schools and churches and schools accessory thereto, but prohibited private schools, in a certain area, and at page 371 this statement appears:

> "The provisions of the zoning ordinance here involved do not apply equally to public, parochial and privately owned schools. So far as the purposes of the ordinance are concerned, there is no difference between public and parochial schools on the one hand and private schools on the other. While ownership, some of the subjects taught, and the discipline enforced may be different in each from what they are in the others, a private school has no effect upon a residential area different from that of a public or parochial one. The distinction between the different kinds of schools upon which the classification made in the ordinance rests, is not based upon alleged evils which it is claimed exist in the case of private schools and do not exist in the case of public or parochial schools. The distinction is based solely upon ownership. Such a distinction bears no relation to the purposes of the ordinance, and for that reason is arbitrary. The ordinance denies to private schools, the rights which it accords to public and parochial schools under the same circumstances. Thereby the ordinance fails to accord to private schools the equal protection of the law."

20 Fed. 2d 743 (Ohio), *Village of University Heights et al. vs. Cleveland Jewish Orphans' Home,* was a case where an ordinance created a Plan Commission and gave the Plan Commission authority to relax restrictions in certain cases. The defendant sought authority to erect a home for orphans in a residence district. The Plan Commission found that the public convenience and welfare would not be promoted, and denied the application.

At page 745 the Court stated that the objections of the Plan Commission were based on the following grounds:

(1) That the land would be withdrawn from the tax duplicates, resulting in a loss of assessed values to the City; (2) that there would be a larger number of children attending the local school which would require additional accounting and inspection by the board of education; and (3) that the public welfare would be further affected, because in the opinion of the Commission, a school in any community, predominantly attended by the children of a single race, creed or nationality, is hurtful to the community.

The Court held that as applied to this case, the regulation was unreasonable, and the ordinance invalid on the ground that the use was permitted in one instance and denied in another under like circumstances.

384 Ill. 428, 181 N.E. 312, *Kennedy vs. Evanston,* held that property owners may rely on a zoning ordinance unless it is changed for the public good.

94 A. 2d 482, *Yanow vs. Seven Oaks Park Inc. et al,* was a case cited by all of the attorneys in their briefs.

In that case the plaintiff, Yanow, and other residents of an area adjoining property owned by the defendant corporation instituted a suit under a zoning ordinance to prevent the defendant from completing a sale of property to Eastern Christian Institute, a corporation. It was alleged that Eastern Christian Institute was using the property formerly known as Colgate House as a post-high school seminary for the training of ministers, and that nine students boarded there at the time the action was commenced. It was alleged that the ultimate plan was to house 50 students. There was no allegation in the complaint that any of such students would reside in East Orange, New Jersey, the city in which the land was located. The complaint alleged that Colgate House prop-

erty should not be used for any other purpose than a one-family residence dwelling. The Eastern Christian Institute attacked the constitutionality of the zoning ordinance, section 4 of which ordinance permitted public and parochial schools, and section 9 of which ordinance provided as follows:

> "Private schools, clubs, lodges, social community center and recreation buildings, are prohibited, unless the written consent of 80 percent, by frontage, of the owners of all lots within 200 feet of the property in question be filed with the building and plumbing inspector, and unless every application for the erection, enlargement or alteration of any such building shall be approved by the Board of Appeals."

It was provided by statute, Sec. 40:55-32, that the purpose in view of the statute was to lessen congestion in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; and avoid undue concentration of population. It was further provided in such statute as follows:

> "Such regulation shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."

The Court in an exhaustive opinion discussed and decided many things which may be summarized as follows:

1. That the provisions of Sec. 9 of the ordinance is invalid.

2. Public and parochial schools were allowed under general school laws.

3. That the terms "public and parochial schools" do not include higher seminaries of learning such as academies or colleges.

4. Parochial schools are in the same category as public schools for zoning purposes. This judicial concept has its foundation in the common law.

5. That public and parochial schools were allowed in the district for the principal purpose of educating the children of the community.

6. At page 489 this statement appears:

> "Eastern has cited decisions of courts in other jurisdictions as support for its contention that the law should be settled in its favor. We find these decisions and others of like import to be readily distinguishable and not dispositive.
>
> "*Catholic Bishop of Chicago vs. Kingery,* 371 Ill. 257, 20 N.E. 2d 583 (Sup. Ct. 1939) is not opposed to our conclusions, for the rationale of the decision there was that where public schools were permitted the exclusion of a parochial school of like category was unreasonable. Compare *Roman Catholic Archbishop vs. Baker,* 140 Ore. 600, 15 P. 2d 391 (Sup. Ct. 1932). To the same effect is *City of Miami Beach vs. State ex rel Lear,* 128 Fla. 750, 175 So. 537, 539 (Sup. Ct. 1937), which related to a multiple dwelling zone."

58 Federal 2d 593, *Women's Kansas City St. Andrews Society vs. Kansas City, Missouri,* was a case which stated that a restriction imposed upon the use of land in a zoning ordinance must bear some substantial relationship to public health, safety, morals, or general welfare. The Court further held that a zoning ordinance may be so clearly arbitrary and unreasonable as to particular property that it is unenforceable.

The restriction in the zoning ordinance was not held applicable against using property for an old ladies home.

90 P. 2d 217, *State vs. Hill,* was a case where a statute provided that written consent of 75% of the owners of surrounding property must be given if property was to be used for a purpose other than residential. This restriction was held invalid as to the erection of a church. The Court further held that each case involving the constitutionality of the zoning law must be determined on its own facts as they appear in the record before the court.

Volume 8 *Words and Phrases,* under the word "Community" held that in ordinary and common usage the word "locality" is synonymous with the word "community", "neighborhood", or "vicinity", citing 139 Fed. 692 (Ohio), *Conley vs. Valley Motor Transit Co.,* and 107 Fed. 2d. 627, *Lukens Steel Co. vs. Perkins.*

140 Wis. 35, *City of Milwaukee vs. McGregor,* et al, was a case involving the building of a state normal school in Milwaukee. The Court held that a legislative act to do a particular thing in a particular way takes precedence over a local or general regulation conflicting therewith.

205 Wis. 207, *City of LaCrosse vs. Elbertson,* held that the power given to a city to pass zoning ordinances must be reasonably exercised but that within the field delegated to the municipality it may go to the boundaries of reason. This case also held that a zoning ordinance may within reason be amended or changed.

205 Wis. 389, *State ex rel Board of Education v. Racine* held that the Board of Education of a city such as Racine is merely an arm of the city government and its contracts are city contracts. The Court further held that the term

"school district" as used in the statutes implies a school system rather than a municipal entity.

222 Wis. 58, *Van Gilder vs. Madison,* held among other things that although municipalities serve their localities in the preservation of the order and the protection of life and property, the discharge of these functions is not a local affair or a matter of local government only but is a matter of state-wide concern and of state government.

223 Wis. 251, *Wis. Telephone Co. vs. City of Milwaukee,* held among other things that the reasonable regulations which a municipality may impose under Sec. 180.17(1), Wis. Stats., are only such as are referable to and within the limits of the police power.

226 Wis. 515, *State ex rel Ford Hopkins vs. Mayor of Watertown,* was a case wherein it was held that the provisions of zoning ordinances are severable.

228 Wis. 404, *State vs. Withrow,* held among other things that in the enactment of ordinances under the police power that the power is confined to regulations which promote the public health, safety, and welfare.

232 Wis. 410, *Geisenfeld vs. Shorewood,* held that a zoning ordinance is unconstitutional and void if it is arbitrary and unreasonable and has no substantial relation to the public health, safety, morals, or general welfare of a municipality.

CONCLUSIONS

The Court finds and concludes as follows:

1. That the right granted to a city council by Sec. 62.23 (a), Wis. Stats., to regulate the location and use of buildings and land for trade, industry, and other purposes, in order to promote the health, safety, morals or the general

welfare of a community, cannot be exercised unreasonably or in an arbitrary manner.

2. That Sec. 14.03(1)(e) of the zoning ordinance of the City of Wauwatosa allows the building of public schools and private elementary schools in an "A" Residence District without regard to the size of the land upon which such schools are built, the number of pupils who might attend such schools, and without regard to the residence of the pupils, or any of them, in attendance. Surely the pupils of a private elementary school might all be nonresidents of Wauwatosa.

3. That even if it be a fact that a public high school might be built anywhere in a municipality regardless of any zoning provisions, this does not change the zoning classification as made by the City Council of Wauwatosa.

4. That nothing appears in the zoning ordinance or in the return of the defendant or the answer of the interpleaded defendant that shows a legal reason or classification for refusing the right to build and maintain a private high school in a "A" Residence District and at the same time allow either a public high school or a private elementary school to be built and maintained in the same district.

5. That no adverse effect on the health, safety, morals, or general welfare of Wauwatosa would result by the building of this private high school.

6. That the general welfare of the residents of the City of Wauwatosa (at least 30 or 40 of them) will be promoted, and the general welfare of other residents of the community residing outside of the corporate limits of Wauwatosa, but adjacent to Wauwatosa, will be promoted.

7. That the question of other uses to which this 13-acre tract of land might be put is immaterial. At least there is no difference as between the use of the land for a public high school, a private elementary school, and a private high school.

8. That there are no issues of fact to be tried herein.

9. That the provisions of Sec. 14.03(1) of the zoning ordinance of the City of Wauwatosa in so far as they allow a public high school and a private elementary school to be built in an "A" Residence District and at the same time prohibit the building of a private high school are unreasonable and discriminatory. Such prohibition is unconstitutional.

10. That to allow the building of a private high school in an "A" Residence District will not adversely affect the general zoning plan of Wauwatosa.

11. That the plaintiff's demurrer to the return of the defendant is sustained on the ground that the return does not state facts sufficient to constitute a defense to plaintiff's cause of action herein.

12. That the plaintiff's demurrer to the answer of the interpleaded defendant is sustained on the ground that the answer does not state facts sufficient to constitute a defense to plaintiff's cause of action herein.

13. That the plaintiff is entitled to the relief demanded in its petition.

14. That proper papers be presented for signing and filing herein in accordance with this opinion and decision.

Dated November 19, 1953.

William C. O'Connell,
Circuit Judge, Presiding.

(i) Copies of Orders and Judgment Appealed From

There is appended hereto, a copy of the order and judgment of the Supreme Court of the State of Wisconsin reversing the orders and judgment of the Circuit Court of Milwaukee County, Wisconsin, and remanding the cause to the said Circuit Court with directions to quash the writ of mandamus.

There is also appended hereto, a copy of the Order of the Supreme Court of the State of Wisconsin denying Appellant's motion for rehearing.

APPENDIX "B"

Remittitur from the Supreme Court of Wisconsin to Circuit Court of Milwaukee County

Be It Remembered, That at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the Second Tuesday, to wit, on the Eleventh day of August A.D. 1953, on the 81st day of the term, to wit: On the 8th day of June A.D. 1954, Present Edward T. Fairchild, Chief Justice, John E. Martin, Grover L. Broadfoot, Timothy Brown, Edward J. Gehl, George R. Currie and Roland J. Steinle, Justices of said Court, the following proceedings were had, Inter Alia, to wit:

STATE OF WISCONSIN ex rel WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,

Respondent,

vs.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa, Wisconsin,

Appellant,

E. L. VANDERJAGT,

Interpleaded Defendant and Appellant.

APPEAL FROM CIRCUIT COURT

Milwaukee County, State of Wisconsin

This cause came on to be heard on appeal from the orders and judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration

whereof, it is now here ordered and adjudged by the Court, that the orders and judgment of the Circuit Court of Milwaukee County, appealed from in this cause, be, and the same are hereby, reversed with costs against the said respondent taxed at the sum of Eight Hundred Forty-five Dollars and Eighty-six Cents ($845.86).

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to quash the writ of mandamus.

Justices Broadfoot and Steinle dissent.

State of Wisconsin, Supreme Court, ss.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 16th day of November, A.D. 1954.

ARTHUR A. McLEOD,
Clerk of the Supreme Court
of the State of Wisconsin.

(Costs of Appellant taxed at $382.00

Costs of Interpleaded Appellant
taxed at 463.86

Total .....$845.86)

(Court Seal)

Order Denying Motion for Rehearing

Be It Remembered, That at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the Second Tuesday, to-wit, on the Tenth day of August A.D. 1954, on the Thirteenth day of the term, to-wit: On the Fifth day of October A.D. 1954, Present Edward T. Fairchild, Chief Justice, John E. Martin, Grover L. Broadfoot, Timothy Brown, Edward J. Gehl, George R. Currie and Roland J. Steinle, Justices of said Court, the following proceedings were had, Inter Alia, to-wit:

APPEAL FROM CIRCUIT COURT

Milwaukee County, State of Wisconsin

Filed Dec. 29, 1954
Francis X. McCormack,
Clerk.

STATE OF WISCONSIN ex rel WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,

Respondent,

vs.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa, Wisconsin,

Appellant,

E. L. VANDERJAGT,

Interpleaded Defendant and Appellant.

The court being now sufficiently advised of and concerning the motion of the said respondent for a rehear-

ing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with $25.00 costs.

State of Wisconsin, Supreme Court, ss.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 28th day of December A.D. 1954.

ARTHUR A. McLEOD,
Clerk of the Supreme Court
of the State of Wisconsin.

(Court Seal)